2013 IL App (2d) 120824-U
No. 02-12-0824
Order filed December 27, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of De Kalb County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-CF-467
	)	
MICHAEL R. GREENWELL,	)	Honorable
	)	Robbin J. Stuckert,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held:* As concealment of homicidal death charge and murder charges were not subject to compulsory joinder, subsequent addition of concealment count did not violate speedy-trial principles.

¶ 2 Defendant, Michael R. Greenwell, was convicted of first-degree murder (720 ILCS 5/9-1 West (2008)) and concealment of a homicidal death (720 ILCS 5/9-3.1 West (2008)). He was sentenced to 38-years' imprisonment on the murder conviction and 5-years imprisonment for concealment of a homicidal death. He now appeals, alleging his counsel was ineffective for failing to move to dismiss the concealment charge on speedy-trial grounds. We affirm.

¶ 3 When a defendant challenges his counsel's effectiveness, the defendant must show that counsel's performance fell below an objective level of reasonableness and that, but for counsel's errors, a reasonable probability exists that the outcome of the proceedings would have been different. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). Here, defendant must demonstrate that "there is a reasonable probability that [he] would have been discharged had a timely motion for discharge been made and no justification has been proffered for the attorney's failure to bring such a motion." *People v. Staten*, 159 Ill. 2d 419, 431 (1994). The failure to file a futile motion does not constitute ineffective assistance. *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). Hence, we must consider defendant's proposed motion on its merits.

¶ 4 Defendant was arrested on September 6, 2009, and charged by complaint with three counts of first-degree murder two days later. Evidence indicated that defendant killed the victim, Brent Petrakovitz, by striking him repeatedly with an axe handle. The murder occurred in the backyard of Walter and Yvette Zick, who were friends of both men. Defendant was not initially charged with concealing a homicidal death. On December 10, 2010, the State filed an indictment charging defendant with the three murder counts (defendant's argument does not implicate these counts) and one count of concealing a homicidal death. The latter charge was based on evidence which showed that, following the murder, defendant placed the victim's body in his truck; drove it to a wooded area; went to a neighbor's house and obtained gasoline and weed killer; returned to where he left the victim and the truck; poured gasoline and weed killer on the victim and the truck; and ignited it.

¶ 5 Defendant claims the addition of the concealment-of-a-homicidal-death charge (see 720 ILCS 5/9-3.1 (West 2008)) resulted in a violation of his right to a speedy trial. In *People v. Williams*, 94 Ill. App. 3d 241, 248-49 (1981), the reviewing court explained:

> "Where new and additional charges arise from the same facts as did the original charges and the State had knowledge of these facts at the commencement of the prosecution, the time within which trial is to begin on the new and additional charges is subject to the same statutory limitation that is applied to the original charges. Continuances obtained in connection with the trial of the original charges cannot be attributed to defendants with respect to the new and additional charges because these new and additional charges were not before the court when those continuances were obtained."

Subsequently, our supreme court held, "If the initial and subsequent charges filed against the defendant are subject to compulsory joinder, delays attributable to the defendant on the initial charges are not attributable to the defendant on the subsequent charges." *People v. Williams*, 204 Ill. 2d 191, 207 (2003). Thus, defendant can succeed on this argument only if the concealment charge was subject to compulsory joinder with the murder charges. *Id.*

¶ 6 Section 3-3 of the Criminal Code of 1961 (Code) (720 ILCS 5/3-3 (West 2008)) sets forth conditions under which joinder of criminal charges is compulsory. It provides as follows:

> "Multiple Prosecutions for Same Act. (a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.
>
> (b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except as provided in Subsection (c), if they are based on the same act.
>
> (c) When 2 or more offenses are charged as required by Subsection (b), the court in

> the interest of justice may order that one or more of such charges shall be tried separately." 720 ILCS 5/3-3 (West 2008).

This provision requires all offenses arising from the same act that are known to the State and within the jurisdiction of a single court to be prosecuted in a single criminal case. *People v. Dismuke*, 2013 IL App. (2d) 120925, ¶ 9. The problem for defendant in this case is that the concealment charge and the murder charges did not arise from the same act.

¶ 7 On this issue, *People v. Mueller*, 109 Ill. 2d 378 (1985), is directly on point. In that case, the evidence showed the following:

> "On April 17, 1982, [the] defendant, Neil Mueller, shot and killed Art Pierson and his son, Roscoe, while on [the] defendant's brother's farm in Scott County. Immediately following the shootings, [the] defendant hoisted the bodies into his truck; he then picked up a pistol and a chainsaw that the Piersons had been carrying and placed them in the Piersons' truck which he found near the scene of the shooting. After moving their truck to a new location, the defendant returned to his own truck and transported the bodies to his farm, also located in Scott County. Once there, he placed both bodies in burlap bags and left them behind some crates in his hog-pit building. Several hours later, [the] defendant returned to the hog-pit building, removed the bodies, and then drove to Cass County, where he deposited the bodies in Clear Creek." *Id*. at 381.

The defendant asserted self-defense and was acquitted of murder. *Id*. Ten days after his acquittal, the State charged him with concealing a homicidal death. *Id*. He was convicted and appealed, arguing his conviction was barred by double jeopardy and, pertinent here, section 3-4 of the Code (see Ill. Rev. Stat. 1981, ch. 38, par. 3-4(b)(1)). Section 3-4 bars the prosecution of an offense

where, *inter alia*, a defendant has been formerly prosecuted and the subsequent prosecution is "for an offense with which the defendant should have been charged on the former prosecution, *as provided in Section 3-3 of this Code*." (Emphasis added.) *Id*. at 382. The defendant argued that "he engaged in a single course of homicidal concealment for which he 'could have been convicted' in the Scott County murder prosecution." *Id*.

¶ 8 The supreme court disagreed. It initially determined that the first clause of section 3-3 was inapplicable, as it codified double-jeopardy principles and the defendant was not in jeopardy of being convicted of concealing a homicidal death in the earlier prosecution. *Id*. at 383-84. Next, it considered the joinder provisions contained in section 3-3. *Id*. at 385. The court acknowledged that the State was aware of both the murder and concealment offenses when it instituted the first prosecution of the defendant. *Id.* Hence, the issue turned on whether the two offenses arose from the same act. The supreme court determined that they did not: "The acts of shooting the Piersons underlay the murder charges; the concealment offense was grounded in defendant's acts secreting the victims' bodies subsequent to the shootings." *Id*. It continued:

> "The fact that the shootings and the acts of concealment were related is irrelevant. There is no requirement of joinder where multiple offenses arise from a series of related acts. [Citations.] 'Section 3-3 is not intended to cover the situation in which several offenses * * * arise from a series of acts which are closely related with respect to the offender's single purpose or plan.' [Citation.] Indeed, the drafters considered and rejected an earlier version of section 3-3(b) which would have required a single prosecution when multiple offenses arose from the same 'conduct' [citation]; the term 'conduct' could, of course, refer to a series of acts [citations.] The purpose of this section as enacted was to preclude successive

> prosecutions where more than one person was injured by a single act of the accused, such as setting off an explosive. [Citations.]"

The court held that section 3-3 did not require the joinder of the concealment and homicide charges. Thus, just because offenses are related does not mean they arise from the same conduct.

¶ 9 We perceive no meaningful difference between the facts of *Mueller* and those of the instant case. As in *Mueller*, defendant's actions here were distinct as they pertained to the homicide and concealment charges. Regarding the homicide charges, defendant beat the victim with an axe handle. As for the concealment charges, defendant placed the victim's body in his truck; drove to a remote location; procured an accelerant; and burned the victim's body. Quite simply, the homicide and concealment charges were not based on the same act. As such, they are outside the scope of the compulsory joinder provisions of section 3-3 of the Code (720 ILCS 5/3-3 (West 2008)). In turn, in accordance with *Williams*, 204 Ill. 2d at 207, no speedy-trial violation occurred.

¶ 10 Defendant attempts to distinguish *Mueller*, pointing out that it is a double-jeopardy case. Defendant notes that in *People v. Hunter*, 2013 IL 114100, ¶ 22, the supreme court stated that the phrase " based on the same act" in section 3-3 (720 ILCS 5/3-3 (West 2008)) must be interpreted in the context of compulsory joinder. It explained, "elements-based analyses of issues such as the one act, one crime doctrine and double jeopardy are independent of the separate issue of whether multiple offenses are based on the same act for compulsory joinder." *Id*. Nevertheless, though *Muller* did involve double jeopardy, it analyzed section 3-3 in terms of joinder. See *Mueller*, 109 Ill. App. 3d at 385-86. As such, we do not find *Mueller* to be meaningfully distinguished on this basis.

¶ 11 Defendant also contends that the policies underlying compulsory joinder have changed since

the supreme court announced its decision in *Mueller*, 109 Ill. 2d 378. Formerly, defendant asserts, compulsory joinder existed to "preclude successive prosecutions where more than one person was injured by a single act of the accused, such as setting off an explosive." *Mueller*, 109 Ill. 2d at 386. Now, according to defendant, the purpose behind the doctrine is " 'to prevent the prosecution of multiple offenses in a piecemeal fashion and to forestall, in effect, abuse of the prosecutorial process.' " *Hunter,* 2013 IL 114100, ¶ 18 quoting *People v. Quigley*, 183 Ill. 2d 1, 7 (1998). We do not see a great distinction between these two asserted purposes–if prosecutions are successive, they are necessarily piecemeal, and the converse is obviously true. More fundamentally, we, note that defendant cited *Hunter* in support of the allegedly modern policy underlying compulsory joinder. *Hunter* cites *Quigley* in support of the existence of these policy considerations. *Quigley*, in turn, cites two cases from the 1960s: *People v. Mullenhoff*, 33 Ill. 2d 445, 447 (1965), and *People v. Golson*, 32 Ill. 2d 398, 410-12 (1965). Indeed, *People v. Lewis*, 112 Ill. App. 3d 626, 629-30 (1983)–released shortly before *Mueller*–discusses "successive prosecutions" in the same paragraph in which it recognizes that the purpose underlying section 3-3 is to prevent prosecutorial abuse. In short, we do not find the policy defendant identifies in *Hunter* to be either new or significantly different from the policy underlying *Mueller*.

¶ 12 Finally, we find defendant's reliance on *People v. Boyd*, 363 Ill. App. 3d 1027 (2006), misplaced. That case involved an incident occurring "in a single location on the same date." *Id*. at 1036. *Boyd* is easily distinguishable. The murder in this case occurred in the Zick's backyard; much of the concealment–notably burning the body–did not. Moreover, the *Boyd* court stated, "The parties correctly agree that all of the charges are subject to compulsory joinder under section 3-3 of the Criminal Code." *Id*. Thus, as this point was not in dispute, this portion of the *Boyd* court's

discussion is *dicta*. See *Nationwide Advantage Mortgage Co. v. Ortiz*, 2012 IL App (1st) 112755, ¶ 30. Finally, we note the *Muller* is more on point than *Boyd* in any event.

¶ 13 To conclude, the concealment charge and the murder charges were not subject to compulsory joinder. Therefore, no speedy-trial violation occurred. As any motion to dismiss on this basis would have failed, defendant's counsel was not ineffective for failing to make such a motion. *Patterson*, 217 Ill. 2d at 438. We accordingly reject defendant's arguments and affirm his conviction of concealment of a homicidal death (720 ILCS 5/9-3.1 West (2008)).

¶ 14 Affirmed.